89-130

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

WALLACE FLOWERS,

Petitioner

v.

CITY OF COLLEGE STATION, TEXAS,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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3 copies.

QUESTIONS PRESENTED

I. In light of *Brower, et al. v. County of Inyo, et al.*, 489 U.S. ——, 103 L.Ed.2d 628, 109 S.Ct. —— (1989), *City of Canton, Ohio v. Harris, et al.*, 489 U.S. ——, 103 L.Ed.2d 412, 109 S.Ct. —— (1989) and established principles regarding summary judgment, did the Fifth Circuit err in affirming the District Court's summary judgment disposing of Flowers' civil rights case against the City of College Station?

II. Should this Court permit municipal civil rights liability to be avoided as a matter of law by the mere discipline of the acting police officer for a technical violation of "roadblock" policy—i.e., failing to notify the dispatcher when the granting of permission for the setting up of a roadblock was the duty of the supervisor on duty and not the dispatcher—when the acting police officer reasonably believed he acted in accordance with department policy and he substantially complied with policy in all material aspects?

III. Can municipal civil rights liability be avoided as a matter of law when the acting police officer undisputedly could have acted as he did pursuant to policies other than the policy specifically directed toward roadblocks?

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OPINION BELOW

The per curiam opinion of the Court of Appeals is unpublished and reproduced at page 1a of the Appendix ("App.") hereto. The District Court's Final Judgment is unpublished and appears at App. 9a.

JURISDICTION

The Fifth Circuit's judgment and opinion was filed on April 25, 1989. App. 1a. This Petition for Writ of Certiorari is filed within 90 days and jurisdiction of the Court is founded upon 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

42 U.S.C. § 1983. Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects,

> or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Rule 56(c), Fed.R.Civ.P. Summary Judgment

> (c) Motion and Proceedings Thereon. . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Excerpts of College Station Police Department "Fresh Pursuits" Policy

VI. Construction of Roadblocks

> D. Prior to setting up roadblocks, involved officers will be required to notify the dispatcher and obtain permission from the shift commander or supervisor on duty to erect or establish the roadblock. . . .

III. Authority for Exemptions [from Texas Uniform Traffic Act]

> B. . . . Officers of this Department will be subject to the following conditions when involved in pursuits:
>
> 1. They may park or stand any police vehicle wherever is necessary.

V. Participation in Pursuits

> A.3. Unless absolutely necessary, no officers will be allowed to move their police unit in front of a fleeing vehicle in order to force it to stop.

G. No officer of this Department, upon being notified of a pursuit in progress, will knowingly assume a course of travel or a location that would put their police unit into the path of oncoming pursued or pursuit vehicles unless otherwise outlined within this policy. Officers may use a police unit to force a reckless evader's vehicle off of a roadway in the following circumstances:

2. When a reckless evader's vehicle is continuing toward an area where a number of people will become endangered if the vehicle is allowed to continue on it's course of travel.

STATEMENT OF THE CASE

A. Introduction

This is a summary judgment case. This is also a civil rights action involving police misconduct and presenting the Court with an opportunity to define further what constitutes municipal "policy or custom," when such policy or custom "causes" constitutional deprivation and under what circumstances summary judgment may be appropriate.

These questions are abstruse and continuing.. In the past term, the Court addressed the issues of "policy or custom" and "causation" in *City of Canton, Ohio v. Harris*, 489 U.S. ——, 103 L.Ed.2d 412, 109 S.Ct. —— (1989), holding that a municipality's failure to train its employees may serve as a basis for § 1983 liability when it amounts to "deliberate indifference" to the rights of the public. This issue is intertwined with those presented in the case at bar.

Also last term, the Court decided in *Brower, et al. v. County of Inyo, et al.*, 489 U.S. ——, 103 L.Ed.2d 628, 109 S.Ct. —— (1989) that a police roadblock may con-

stitute an unreasonable seizure in violation of the Fourth Amendment. This issue also relates to the case at bar wherein police misconduct involved the setting up of a "roadblock."

The continuing questions about policy or custom and causation embodied in police civil rights cases, as well as the recent decisions in *City of Canton* and *Brower*, make the instant case a timely vehicle for further explanation of important unsettled questions of federal law.

The summary judgment aspect in this civil rights case also touches upon the logical limits to the nascent line of authority stemming from *Celotex Corporation v. Catrett*, 477 U.S. 317 (1985). This aspect primarily demonstrates, however, such a departure from the accepted and usual course of judicial proceedings, sanctioned by the Court of Appeals, as to call for an exercise of this Court's power of supervision.

The decision of the Court of Appeals essentially disregarded the fact that the roadblock policy was substantially followed in all material respects and fact issues relating to other policies undisputedly followed by the police officer in setting up the roadblock, and largely constituted an attack on the pleading of the Second Amended Complaint which attack did not justify a dismissal on the merits in light of the record. Well established principles regarding summary judgment were ignored.

This case accordingly involves questions of exceptional importance both on the individual level and in the broader civil rights context and context relating to questions of federal law and summary judgment practice. An additional twist is added to both the summary judgment and civil rights facets by the fact that College Station destroyed potentially critical, relevant evidence.

B. Facts

On February 5, 1987, Wallace Flowers suffered serious injuries when the motorcycle he was driving was involved in a collision with the police squad car of Officer Wayne Thompson.

Prior to the subject collision, one police officer by the name of Walter Sayers communicated by radio that he was in pursuit of Flowers. Officer Thompson then drove toward the area Flowers was approaching and positioned his car across lanes of traffic so as to permit the collision.

On February 16, 1987, counsel for Flowers wrote the College Station City Attorney informing of Flowers' injuries and cause of action under the Texas Tort Claims Act against the City of College Station as a result of Officer Thompson's pulling "directly into the north bound lanes of traffic striking the motorcycle driven by Flowers." Approximately two weeks after receiving this letter, the City of College Station "reutilized" the dispatch tape which had contained radio communications relating to the subject collision, thereby destroying potentially critical evidence.

In May of 1987, Flowers brought this civil rights action in the United States District Court for the Southern District of Texas against the City of College Station, Texas and Wayne Thompson who at all relevant times was a police officer with the College Station Police Department.

In his Second Amended Complaint, Flowers alleged that

> Defendant Thompson acted pursuant to the procedures, practices, policies and/or customs of the College Station Police Department including but not limited to those relating to roadblocks and/or the apprehension and pursuit of suspects and/or the use of force, or his reasonable understanding thereof. Such procedures, practices, policies and/or customs

were approved, adopted and/or ratified by the Defendant City of College Station.

Flowers alleged that the injuries he suffered were the direct and proximate result of Defendants' wrongful actions, and that his constitutional deprivations included but were not limited to his right to be free from the use of excessive physical police force. Flowers also alleged that the actions of both the City of College Station and Officer Thompson constituted "gross negligence and indifference with respect to the rights of Plaintiff."

In July 1988, Flowers filed a motion for default or summary judgment or other sanctions against the City of College Station based on its destruction of the relevant dispatch tape.

Also in July 1988, College Station filed its Motion for Summary Judgment, largely relying on *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), and contending that the acts or omissions of Officer Thompson were not done pursuant to the policy of the City of College Station police department, that there was no causal connection between the violation of Flowers' civil rights and city policy, and that proof of a single incident is not sufficient to impose liability on a municipality where the city's policy is not facially unconstitutional.

The record before the District Court consisted of affidavits and deposition transcripts submitted by both Flowers and College Station supporting their own summary motion and opposing the other's summary motion.

In his own opinion, Officer Thompson acted in accordance with the procedures, policies, and/or customs of the College Station Police Department when he set up the subject "roadblock."

Following the subject collision, however, Thompson was disciplined by the police department because he had failed "to notify the dispatcher before he set up his vehicle."

The police department policy regarding roadblocks stated in relevant part as follows:

> Prior to setting up roadblocks, involved officers will be required to notify the dispatcher and obtain permission from the shift commander or supervisor on duty to erect or establish the roadblock.

At the time of the collision, police policy did not define who was a "supervisor on duty."

Thompson had believed that he had the authority to set up a roadblock because he held a supervisory position and considered himself a "supervisor on duty."

Moreover, as Thompson understood city policy, he was not to notify the dispatcher because in a pursuit situation only the pursuit vehicle was to be on the radio. The duties of the dispatcher as set out in the record did not include the granting of permission to an officer to set up a roadblock or otherwise place his vehicle in front of a pursuit vehicle.

Thompson's deposition testimony indicated that the extent of training normally rendered with respect to the Police Department's policies was the passing out of written memoranda with it being up to each individual officer to read and determine if he understood the policies, after which he could ask his supervisor if necessary. Thompson believed that he understood the pursuit policies at the time of the collision.

Thompson also believed that his actions were in accordance with other police department pursuit policies as follows:

(1) that policy relating to Thompson's placing his police vehicle where necessary,

(2) that policy relating to Thompson's moving his unit in front of Flowers' motorcycle when Thompson believed it was "absolutely necessary," and

(3) that policy relating to Thompson's placing his unit in the path of an oncoming pursuit vehicle when (a) persons might otherwise be endangered and (b) Thompson himself authorized the action as a supervisor on duty.

None of the pursuit policy provisions referenced above required prior notification of the dispatcher. College Station adduced no evidence to show that Thompson could not have justifiably acted as he did pursuant to the above-referenced policies.

Subsequent to the Flowers incident, the Police Department adopted an in-service training course regarding policies and procedures as well as a definition for "supervisor on duty."

In September 1988, the District Court held a hearing on Flowers' Motion for Summary Judgment or Other Sanctions and College Station's Motion for Summary Judgment. Following that hearing, the District Court entered Final Judgment ordering College Station to pay Flowers $3,000.00 as a sanction for destruction of evidence and dismissing Flowers' civil rights claims against both the City of College Station and Wayne Thompson. See App. 9a. Prior to the District Court's entry of Final Judgment, Thompson had not even moved for summary judgment.

The Fifth Circuit thereafter reversed the District Court judgment with respect to Thompson, but affirmed with respect to the City of College Station. Admitting that the District Court "*found* that because Officer Thompson did not obtain permission for the roadblock, he did not act pursuant to official policy or custom," the Court of Appeals held that there could therefore be "no causal relation between [College Station's] roadblock policy and any deprivation of Flowers' constitutional rights." App. 6a (emphasis added).

Curiously, the Court of Appeals then proceeded to ignore the facts that were in the record before the District

Court and justified the judgment in favor of College Station by attacking Flowers' allegations pled in his Second Amended Complaint. App. 6a-7a. Summary judgment was justified because Flowers had failed to call out particular causes of action or legal characterizations by their terms of art such as "unreasonable seizure" and "failure to train." Although Flowers' Second Amended Complaint had spoken of "indifference with respect to the rights of Plaintiff," this was not deemed adequate by the Court of Appeals to allege that the failure to train "amounts to deliberate indifference to the rights of persons with whom the police come into contact." App. 7a.

The Court of Appeals then blasted Flowers' civil rights claims against College Station into obscurity and insignificance by issuing an unsigned, per curiam opinion that was not to be published.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. The Fifth Circuit's affirmance of the District Court's dismissal of Flowers' civil rights claims against the City of College Station is repugnant to this Court's recent decisions in *Brower, et al. v. County of Inyo, et al.*, 489 U.S. ——, 103 L.Ed.2d 628, 109 S.Ct. —— (1989), *City of Canton, Ohio v. Harris, et al.*, 489 U.S. ——, 103 L.Ed.2d 412, 109 S.Ct. —— (1989) and established principles regarding summary judgment.

Pursuant to this Court's decision in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), a municipality may be found liable under 42 U.S.C. § 1983 "when the 'execution of the government's policy or custom . . . inflicts the injury' " complained of. *City of Canton, supra*, 103 L.Ed.2d at 424, quoting *Springfield, Mass. v. Kibbe*, 480 U.S. 257, 267 (1987) (O'Connor, J., dissenting) quoting *Monell*, 436 U.S. at 694.

The District Court and Court of Appeals in this case appear to have found as a matter of law either that there

was no "policy" or that there was no "causation" of the injury by the "policy." Although the exact reasoning for the summary judgment and the subsequent affirmance is unclear from the opinions, neither ground mentioned above would suffice and Flowers should not have been deprived of his day in court.

The civil rights dispute now before the Court involves two types of "policy": the written policies that motivated Thompson's actions which caused Flowers' injuries, and the unwritten policy of the inadequate training afforded Thompson which brought about the unreasonable roadblock.

The failure of the written policies to define key terms such as "supervisor on duty," the person having authority to authorize a roadblock, and the inconsistency of these policies as to when and how an officer may set up a roadblock—*in light of the lack of training provided officers*—resulted in the deprivation of Flowers' constitutional rights. The vagueness and incompleteness of police policies relating to pursuits and roadblocks take on causal significance with respect to public safety *in direct proportion* to the adequacy of the training a municipality provides its officers in that regard.

Considered under the authority of both the *City of Canton* decision, *supra*, and the *Brower* decision, *supra*, the record contained questions of fact which made the District Court's summary disposition against Flowers and the affirmance by the Court of Appeals improper.

The case at bar comes within the ambit of the *City of Canton* decision, *supra*. It does not seek to impose liability on the basis of respondeat superior, but rather addresses an unconstitutional application of an incomplete policy by a municipal employee who was inadequately trained. *City of Canton*, 103 L.Ed.2d at 425. As roadblocks by definition imply a forcible stop if necessary, see *Brower*, *supra*, 103 L.Ed.2d at 636, a failure to train

police officers specifically in this regard raises a fact issue as to whether the municipality has been deliberately indifferent with respect to the rights of its inhabitants. See *City of Canton*, 103 L.Ed.2d at 427. Thompson's training with respect to the fresh pursuits policy—the mere receipt of a written policy—itself raises a fact question as to its adequacy.

The *Brower* decision also provides authority for Flowers' civil rights claim against the City of College Station. The roadblock constituted a "seizure." *Brower*, 103 L.Ed.2d at 636-37. Summary judgment accordingly would have been appropriate only if the record showed as a matter of law that this "seizure" was reasonable. College Station did not even raise the issue of reasonableness of the seizure in its summary judgment motion. Moreover, the issue of reasonableness generally is a fact question, and College Station's own action in disciplining Thompson essentially admits the unreasonable nature of the "seizure."

The unsettled issues which preclude summary judgment under both the *City of Canton* and *Brower* decisions take on additional significance in light of College Station's destruction of the relevant dispatch tape. Evidence destroyed must be presumed to have been damaging, and why should College Station be allowed to benefit via summary judgment as a possible result of the absence of evidence that it destroyed?

Significant with respect to whether the policy "caused" the injuries of Flowers is the rationale of Justice Scalia in *Brower*, *supra*, that "[i]n determining whether the means that terminates the freedom of movement is the very means that the government intended, we cannot draw too fine a line." 103 L.Ed.2d at 637.

The *City of Oklahoma City v. Tuttle* decision, *supra*, and its focus on causation does not control the instant case. The point that troubled Justice Rehnquist in *Tuttle*

was that a plaintiff should not be able to take a single incident and extract from that incident a "policy," and then turn around and use that same incident to show that the "policy" "caused" the constitutional deprivation:

> "Here the instructions allowed the jury to infer a thoroughly nebulous 'policy" of "inadequate training" on the part of the municipal corporation from the single incident described earlier in this opinion, and at the same time sanctioned the inference that the "policy" was the cause of the incident."

471 U.S. at 823.

The problem of a "nebulous policy" does not pertain to the case at bar. In *City of Oklahoma v. Tuttle*, there was no written policy pursuant to which Officer Rotramel wrongfully shot and killed the individual. Accordingly, the Supreme Court had a problem in finding that the "policy" or "lack of policy" *caused* the killing. In the case at bar, there is no question as to the existence of a policy or several policies that motivated Thompson's actions and ultimately injured Flowers.

The policies pursuant to which Thompson acted were written and were made a part of the record. As writings, they reflected a "conscious decision," an affirmative act, on the part of College Station. Thompson testified that he acted pursuant to these College Station Police Department policies.

As a matter of public policy, the law which protects the rights of our citizenry should encourage that police department policies are clearly written so as to avoid unnecessary injury and constitutional violation. At the very least, adequate training should be provided if they are not clear. Where a policy allows constitutional violation by a policeman acting in accordance with his reasonable understanding of that policy, the municipality should answer.

Additionally, under the standard set out in *Monell*, apart from its interpretation in *City of Canton* and *Brower*, Flowers showed a civil rights claim against College Station. The essence of College Station's defense was that because Thompson was disciplined for failing to notify the dispatcher, he violated a city policy and therefore could not have acted in accordance with city policy in bringing about the injuries that Flowers suffered.

Officer Thompson, however, believed that as he held a supervisory position he had authority to set up a road block on his own. The policy was incomplete as written, omitting the definition of supervisor on duty, and College Station's failure to train Thompson otherwise supported the reasonableness of his belief. College Station adduced no evidence to show that Thompson *was* trained in this regard.

Whether Thompson actually violated policy of the College Station Police Department, insofar as the operative portion of the roadblock policy is concerned, or whether he acted in accordance with this policy was a fact question.

Any finding by the City of College Station that Thompson violated official police policy would not have been conclusive or binding on the District Court. Indeed, if it were, any municipality would be able to avoid liability for its wrongful conduct by disciplining the individual involved who may have reasonably believed he was acting in accordance with policy or may in fact have been acting in accordance with policy. That would not be good constitutional policy.

Whether Thompson reasonably believed that he was acting in accordance with the policy of the College Station Police Department when he took the actions giving rise to the basis for this lawsuit was a fact question. The reasonableness of Thompson's belief goes to the adequacy of his training.

Whether the policy of the College Station Police Department pursuant to which Officer Thompson believed he was acting was so contradictory, or so vaguely or incompletely written, that a reasonable police officer could reasonably believe he was acting according to the policy was a fact question. The corollary—whether there was a failure to train relating to pursuit and roadblock situations, which obviously affect safety, thereby indicating a conscious indifference to public rights—is likewise a fact question.

The different shades of fact issues created by the conflicting evidence presented by both College Station and Flowers rendered summary judgment inappropriate. It cannot be said, as a matter of law, that the policy pursuant to which Thompson believed he was acting did not cause Flower's deprivation of civil rights.

It cannot be said, simply because College Station disciplined Thompson for violation of a policy, that as a matter of law Thompson was not acting in accordance with that specific College Station policy, or other applicable policies, or the body of College Station policies governing this type of circumstance. Thompson himself reasonably believed that he was acting in accordance with College Station policy, and for purposes of summary judgment, the evidence must be viewed in the light most favorable to the nonmovant, Flowers.

For the District Court Judge to hold as a matter of law that Thompson did not act in accordance with College Station policy required that he resolve that factual issue, contrary to the established summary judgment principle that the District Court's function in deciding a summary judgment motion is to determine only whether there is an issue of fact to be tried. The Court of Appeals even admitted this resolution in its opinion, but justified it by condemning Flowers' pleadings.

With respect to motions for summary judgment, the nonmovant's pleadings should be liberally construed.

Cayce v. Carter Oil Company, 618 F.2d 669, 672-73 (10th Cir. 1980). Liberal construction promotes the spirit of the Federal Rules of Civil Procedure that disputes are to be decided on their merits. As this Court has previously stated,

> [t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

United States v. Hougham, 364 U.S. 310, 317 (1960), quoting *Conley v. Gibson*, 355 U..S 41, 48 (1957). Rule 8, Fed.R.Civ.P., sets a standard of notice pleading.

Also, all inferences from the record before the court must be drawn in favor of the party opposing the motion, cf. *Adickes v. S. H. Kress and Company*, 398 U.S. 144, 157 (1970) with *Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. 574, 587 (1986), and any questions as to the adequacy of the record to support summary judgment must be resolved in favor of the nonmovant. *Phillips v. Martin Marietta Corporation*, 400 U.S. 542, 544 (1971).

Rule 56(c) by its very terms, quoted at page 2, contemplates that the District Court will be looking to the ensemble of pleadings, deposition excerpts on file, and affidavits on file in coming to a conclusion as to whether a nonmovant is unable to sustain a cause of action as a matter of law. The pleadings are not to be considered in a vacuum, but in conjunction with the facts in the record and the applicable law.

Flowers gave adequate notice of his civil rights claim against the City of College Station by the Second Amended Complaint, quoted at pages 5-6, *supra*. The evidence that existed in the District Court record, set out above, and inferences therefrom, considered in the light most favorable to Flowers did not show conclusively that Flowers

has no civil rights claim against College Station and indeed reflected fact issues giving rise to a genuine claim not only considered on their own merits under *Monell*, but also under both the *Brower* and *City of Canton* decisions further explaining this standard.

II. This Court should not permit municipal civil rights liability to be avoided as a matter of law by the mere discipline of the acting police officer for a technical violation of "roadblock" policy—i.e., failing to notify the dispatcher when the granting of permission for the setting up of a roadblock was the duty of the supervisor on duty and not the dispatcher—when the acting police officer reasonably believed he acted in accordance with department policy and he substantially complied with policy in all material aspects.

To allow the summary judgment to stand would enable College Station to avoid responsibility for its wrongful conduct by ferreting a technical violation of a policy that was in all meaningful ways followed.

Inspection of the specific, alleged policy violation shows that the "violation" was not causally related to the collision and that insofar as causation of the collision was concerned, city policy was followed in all relevant and material aspects.

The violation was that Thompson did not notify the dispatcher. The apparent purpose of notifying the dispatcher, however, had nothing to do with Thompson's obtaining permission to set up a roadblock or otherwise engage in the subject course of conduct.

The deprivation of Flowers' civil rights was not brought about by the alleged policy violation, the failure to notify the dispatcher. Rather, the deprivation of Flowers' civil rights was brought about by Thompson's placing his police vehicle in the path of Flowers' motorcycle which Thompson testified he had authority to do because he was a supervisor and which the policy itself

permits a supervisor to authorize. College Station failed to adduce evidence that Thompson could not be considered a "supervisor" and the record showed that there was no definition of "supervisor on duty" at that time.

Under College Station's perspective, Thompson could have complied with city policy and could have set up his "roadblock," thereby still seriously injuring Mr. Flowers, so long as he first "notified the dispatcher." Doubtless there would be a civil rights violation in this circumstance: Thompson could have made the decision to set up the road block on his own, but so long as he technically notified the dispatcher, his injury of Mr. Flowers had the blessing of the City of College Station. This perspective underscores the point that the causal flaw in the totality of the circumstances was incomplete policy and inadequate training as opposed to a failure to notify the dispatcher.

Whether there was a technical violation of policy is inconsequential in light of the fact that the actions taken that caused the injuries were in substance in compliance with policy.

The question of municipal civil rights liability should not depend on whether there was technical compliance with municipal policy, but rather whether there was substantial compliance with policy in all material aspects, as there was in this case.

III. Municipal civil rights liability should not be avoided as a matter of law when the acting police officer undisputedly believed he did act and could have acted as he did pursuant to policies other than the policy specifically directed toward roadblocks.

Specific policy provisions and testimony of Thompson justifying his action in placing his squad car in front of Flowers' motorcycle, without notification of the dis-

patcher, are detailed at pages 7-8, *supra*, and the specific policy provisions followed are quoted at pages 2-3, *supra*.

Plaintiff came forward in the trial court with evidence that Officer Thompson did in fact act in accordance with the procedures, policies, and/or customs of the College Station Police Department in setting up the roadblock as he did, thereby injuring Flowers.

Summary judgment was improper.

CONCLUSION

The actions of the lower courts in this case have so far departed from the accepted and usual course of judicial proceedings that they call for an exercise of this Court's power of supervision.

These actions also mishandled important questions of federal law and the civil rights of one American citizen.

For all the reasons set out above, the judgment of the Court of Appeals affirming the dismissal of Flowers' civil rights claims against the City of College Station should be reversed and this case should be remanded for further proceedings and for such other and further relief as may be just and appropriate.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-6004
Summary Calendar

WALLACE FLOWERS
Plaintiff-Appellant,

versus

CITY OF COLLEGE STATION, TEXAS;
and WAYNE THOMPSON,
Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Texas
(CA-H-87-1694)

(April 25, 1989)

Before REAVLEY, JOHNSON and JOLLY, Circuit Judges.

PER CURIAM: *

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to

In this case we are asked to consider whether the district court erred in dismissing Wallace Flowers' section 1983 civil rights claim against the City of College Station and College Station police officer Thompson, seeking damages for injuries Flowers sustained when hi motorcycle collided with Thompson's police car. We affirm in part and reverse in part.

On February 5, 1987, two College Station police officers, Officers Sayers and Vannest, drove to Wallace Flowers' home to serve him with an arrest warrant. When they arrived at his apartment building they saw a person, whom they believed to be Flowers, drive off on a blue motorcycle and they gave chase. Officer Sayers communicated by radio that he was in pursuit of a man on a motorcycle, gave his location—northbound on Texas Avenue—and turned on his overhead flashers.

Officer Thompson was patrolling Texas Avenue when he heard Officer Sayers' radio transmission. He had himself been driving north on Texas Avenue, and made a U-turn into southbound traffic so that he would be moving toward Officer Sayers and could provide him backup should it be needed. According to his deposition testimony, Thompson then activated his own overhead lights, red lights, and sirens and was proceeding through a red light at the intersection of Texas Avenue and Holleman when he spotted Sayers' overhead lights down Texas Avenue. Thompson then turned left across the Intersection and eased his squad car across the three lanes of traffic on Texas Avenue until he partially blocked the outside and middle lanes. He did not notify the dispatcher before he set up the roadblock. Thompson testified that his squad car was stopped when he first saw Flowers, about 300 yards away, pull out into the outside lane from behind traffic that was slowing down for his squad car. According to Thompson, Flowers slowed down, swerved

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that Rule, the court has determined that this opinion should not be published.

as if he intended to avoid Thompson's car, but then collided with the squad car's front end. Flowers suffered injuries including fractures of his left leg and ankle.

On May 27, 1987, Flowers filed his original complaint, which was superseded by Flowers' Second Amended Complaint, filed on March 14, 1988, by leave of court. The Second Amended Complaint named as defendants both the City of College Station and Officer Thompson, and alleged that acting under color of law, pursuant to official policies or procedures of College Station, Officer Thompson deprived Flowers of certain constitutional rights, including his right to be free from the use of excessive physical force by the police. Flowers also alleged that Officer Thompson's actions constituted negligence, gross negligence, willful misconduct, an assault and outrageous conduct.

On July 1, 1988, College Station filed a Motion for Summary Judgment, contending that Officer Thompson's acts or omissions were not done pursuant to city policy, because Thompson had not contacted the dispatcher and obtained permission from his supervisor before setting up the roadblock as required by the police department's official written policy.[1] Therefore the City's policy pertain-

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[1] Operations—3, V paragraph G of the City of College Station police department policy manual states:

> No officer of this department, upon being notified of a pursuit in progress, will knowingly assume a course of travel or a location that would put their police unit into the path of oncoming pursued or pursuit vehicles unless otherwise outlined within this policy.

Operations—3, VI Paragraph A states: "A roadblock may be constructed to stop a fleeing vehicle as long as a reasonable effective advance warning is given." Paragraph C allows for a roadblock if "probable cause exists for officers to believe that the operator of a fleeing vehicle is responsible for the commission of a felony for which the use of deadly force is justified." Paragraph D, however, states that: "Prior to setting up roadblocks, involved officers *will be required to notify the dispatcher and obtain permission* from

ing to roadblocks did not *cause* any deprivation of Flowers' constitutional rights. Alternatively, the City argued, proof of a single unconstitutional incident is not sufficient to impose liability on a municipality unless proof of the incident includes proof that it was caused by an existing unconstitutional policy, and Flowers made no argument that the city's policy was unconstitutional.

Officer Thompson did not move for summary judgment.

On September 8, 1988, the district court dismissed Flowers' civil rights action against both the City of College Station and Officer Thompson, and allowed Flowers ninety days to file his tort claim in state court. The court did not give reasons for that dismissal.

Flowers argues on appeal that the district court erred in granting summary judgment to Officer Thompson because Thompson never moved for summary judgment, and erred in granting summary judgment to the City of College Station because (1) issues of material fact existed as to whether Thompson had acted in accordance with the policies and procedures of the College Station police department, and (2) Thompson's actions pursuant to that policy caused the deprivation of Flowers' constitutional rights.

II

The Supreme Court recently decided a case similar to ours in *Brower v. County of Inyo*, 57 U.S.L.W. 4321 (U.S. Mar. 21, 1989). The petitioners' decedent in *Brower* was killed at night when the stolen car he had been driving at high speeds to elude pursuing police crashed into a police roadblock. The petitioners brought

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the shift comander or supervisor on duty to erect or establish the roadblock."

Officer Thompson testified at his deposition that he believed that he himself was the supervisor on duty, and therefore did not need to obtain ayone else's permission before setting up the roadblock. He further testified that his understanding of department policy was that the radio is to be clear of other traffic when a pursuit unit is making transmissions.

suit under section 1983, alleging that the police had acted under color of law to violate Brower's fourth amendment rights by effecting an unreasonable seizure using excessive force. The complaint alleged that the police had placed an eighteen-wheel truck completely across the highway in the path of Brower's flight, effectively concealed the roadblock by placing it behind a curve and leaving it unilluminated, and positioned a police car with its headlights on in front of the truck so Brower would be "blinded" on his approach. It further alleged that Brower's fatal collision with the truck was a proximate result of this official conduct. The Supreme Court held that a fourth amendment seizure had occurred, because "it [is] enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result . . . Bower was meant to be stopped by the physical obstacle of the roadblock and . . . was so stopped." 57 U.S.L.W. at 4323. The Court remanded to the court of appeals for consideration of whether the district court had properly dismissed the fourth amendment claim on the basis that the roadblock did not effect a seizure that was unreasonable.

The Supreme Court granted certiorari in *Brower* to resolve a conflict between the Ninth Circuit's decision in that case that no seizure had occurred, 817 F.2d 540 (9th Cir. 1987), and this circuit's contrary holding in *Jamieson v. Shaw*, 772 F.2d 1205 (1985), that a plaintiff, who was injured when the car in which she was a passenger drove into a "deadman" roadblock, had sufficiently alleged a claim under the fourth amendment that the seizure of her person was unreasonable by virtue of the excessive force employed to accomplish it. Because Jamieson had alleged a "practice and procedure" of ignoring fourth amendment requirements in police work by city police officers, as well as the city's failure to instruct and train these officers regarding compliance with the fourth amendment, and further alleged that the execution of that official policy resulted in her injury, this

circuit found her complaint sufficient to state a claim under Fed. R. Civ. P. 12(b)(6), and granted her leave to amend that complaint. The Supreme Court decision in *Brower* reaffirmed our circuit's holding in *Jamieson* that a roadblock may result in an unreasonable seizure under the fourth amendment.

A.

We turn first to the district court's dismissal of Flowers' claim against the city. We must assume, because the district court's order says little, that the district court in the instant case never reached the issue of whether a constitutional violation had occurred since it found that because Officer Thompson did not obtain permission for the roadblock, he did not act pursuant to official policy or custom. The City of College Station therefore would not be liable under section 1983, since there was no causal relation between its roadblock policy and any deprivation of Flowers' constitutional rights.

The Supreme Court held in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), that a municipality can be found liable under section 1983 only where the municipality itself causes the constitutional violation at issue; *respondeat superior* or vicarious liability will not attach under section 1983. *City of Canton v. Harris*, 57 U.S.L.W. 4270, 4272 (U.S. Feb. 28, 1989). Only when the execution of the government's policy or custom inflicts the injury may the municipality be held liable under section 1983. *Id.*

Flowers has not alleged that either the City of College Station's particular policy governing roadblocks as written is unconstitutional, or that city officers had a practice of disobeying that policy. "Proof of a single incident of unconstitutional action is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy." *City of Oklahoma City v. Tuttle*, 471

U.S. 808 (1985) (quoted in *Jamieson* at 1213). "But where the policy relied upon is not itself unconstitutional, considerably more proof than a single incident will be necessary. . . ." *Jamieson*, 772 F.2d at 1213. By simply stating that the City of College Station has a policy governing roadblocks, Flowers has not alleged that the city has a policy of using those roadblocks in a manner inconsistent with the fourth amendment's proscriptions against unreasonable seizures. Nor has Flowers alleged that his collision was a proximate result of the City of College Station's failure to train its police officers which failure "amounts to deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton*, 57 U.S.L.W. at 4273. Because Flowers did not allege, and necessarily did not bear his burden of proving that a material issue of fact existed regarding the existence of a city policy, which was a "moving force" behind a constitutional deprivation, *Monell* 436 U.S. at 694, the district court properly dismissed Flowers' section 1983 claim against the City of College Station.

B.

We turn now to Flowers' claim that the district court erred in granting summary judgment *sua sponte* for Officer Thompson, because Thompson had not moved for summary judgment.

This circuit's footnote in *Powell v. United States*, 849 F.2d 1576, 1578-79, n.6. (5th Cir. 1988), has suggested that the district court may be empowered to enter summary judgment *sua sponte*. We need not decide this issue, however, because we find that Flowers did not receive the ten days' notice required by Rule 56(c) of the Federal Rules of Civil Procedure.

Thompson argues that Flowers did have notice that a summary judgment could be entered against him in his civil rights claim against Thompson: the City of College Station made its motion for summary judgment on July

1, 1988, two months prior to the district court's entry of summary judgment against Thompson, and the basis for the city's motion was that Officer Thompson's acts or omissions were not done pursuant to official policy or custom. This is not dispositive because it is not clear on what grounds the district court dismissed Flowers' civil rights claim against Officer Thompson: whether it found that Thompson had not acted in accordance with city policy; whether Flowers had failed to raise a genuine issue of material fact concerning whether Thompson's conduct and not Flowers' own negligence had been the proximate cause of Flowers' injury, *see Brower*, 57 U.S.L.W. at 4323; whether Flowers had failed to show that a material issue of fact remained as to the unreasonableness of Thompson's roadblock, *see id.*; or whether Thompson was entitled to qualified immunity as matter of law, because a reasonable officer in his position would not have known or have had reason to know that his actions in setting the roadblock would violate Flowers' clearly established constitutional right to be free from an unreasonable seizure, *see Gassner v. City of Garland*, 864 F.2d 394, 396-98 (5th Cir. 1989).

Because the city's filing of a motion for summary judgment did not constitute sufficient notice to Flowers that he had to come forward with all his evidence on the issue of Thompson's liability, we reverse the district court's grant of summary judgment in favor of Officer Thompson, and remand for further proceedings.

III

For the foregoing reasons, the judgment of the district court is

AFFIRMED IN PART and REVERSED IN PART.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-87-1694

WALLACE FLOWERS,
Plaintiff,

VS.

CITY OF COLLEGE STATION, TEXAS,
and WAYNE THOMPSON,
Defendants.

FINAL JUDGMENT

The City of College Station is ordered to pay Wallace Flowers $3,000 as a sanction for the destruction of evidence. Flowers's civil rights claim against the City of College Station, Texas, and Wayne Thompson is dismissed. Flowers has 90 days to file his tort claims in state court.

Signed on September 8, 1988, at Houston, Texas.

/s/ Lynn N. Hughes
LYNN H. HUGHES
United States District Judge

(2)

No. 89-130

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

WALLACE FLOWERS,
Petitioner

V.

CITY OF COLLEGE STATION, TEXAS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING BEFORE THE FIFTH CIRCUIT COURT OF APPEALS

The parties to the proceedings below were petitioner Wallace Flowers, respondent City of College Station, Texas and Officer Wayne Thompson.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent City of College Station, Texas, respectfully prays that petitioner's request for review by certiorari be denied.

STATUTES AND REGULATIONS INVOLVED

42 U.S.C. § 1983. Civil action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

Fed.R.Civ.P. 56(c) Summary Judgment

> Motion and Proceedings Thereon. . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Excerpts from the City of College Station Police Department Policy Manual:

V. Participation in Pursuits

A.3. Unless absolutely necessary, no officers will be allowed to move their police unit in front of a fleeing vehicle in order to force it to stop. They will be allowed to move up along side of a

fleeing vehicle and motion for the operator to pull over. ...

G. No officer of this Department, upon being notified of a pursuit in progress, will knowingly assume a course of travel or a location that would put their police unit into the path of oncoming pursued or pursuit vehicles unless otherwise outlined within this policy. Officers may use a police unit to force a reckless evader's vehicle off of a roadway in the following circumstances:

1. When a fleeing vehicle rams into their patrol unit in an attempt to cause them to wreck.

2. When a reckless evader's vehicle is continuing toward an area where a number of people will become endangered if the vehicle is allowed to continue on it's course of travel.

3. When officers have authorization from a shift commander or supervisor on duty to participate in construction of a roadblock.

VI. Construction of Roadblocks

A. Officers may construct a roadblock to divert traffic or to stop a fleeing vehicle. In either event, officers must employ a reasonably effective advance warning system in order to alert

motorists of a roadblock in use, including reckless evaders. ...

C. If there is probable cause for officers to reasonably believe the operator of a fleeing vehicle is responsible for the commission of a felony for which the use of deadly force is justified by this department's use of force policy, the roadblock may be constructed so as to cause the vehicle to stop. Enough room will be allowed so that - the operator of a fleeing vehicle will be able to come to a stop without striking the roadblock vehicles or other structures used as a part of the roadblock.

D. Prior to setting up roadblocks, involved officers will be required to notify the dispatcher and obtain permission from the shift commander or supervisor on duty to erect or establish a roadblock. The exact location of where the roadblock will be set up will be given to the dispatcher after officers have received authorization to erect one. Supervisory officers will have the authority to deny any authorization for setting up or establishing a roadblock or to change the location of the roadblock. Unless otherwise advised, officers authorized to set up a roadblock will assume that a fleeing vehicle is only wanted for violation of a misdemeanor violation and construct the roadblock accordingly.

III. Authority for Exemptions

C. Even though officers become legally engaged in a pursuit situation, they are not relieved of their duty to drive with due regard for the safety of all persons, nor are they protected from any consequences that may result from their reckless disregard for the safety of lives and property of others. Any officer's ability to supervise or control another motorist's actions by the nature of existing circumstances that prevail at any given time are limited. It will be left up to the individual officer involved to avoid any unnecessary contribution to the dangers already created by a violator's vehicle in all pursuit situations.

STATEMENT OF THE CASE

I. Facts

On February 5, 1987, two College Station police officers, Walter Sayers and Richard Vannest, drove to Wallace Flowers' residence in College Station to serve a warrant for his arrest. Upon arriving at the apartments, the officers saw a person on a motorcycle whom they believed to be the petitioner. Officer Sayers followed the motorcycle driven by Flowers east on Valley View street, then north on Texas

Avenue. Officer Sayers communicated by radio that he was in pursuit, conveyed his location and initiated his overhead flashers.

Upon hearing this information via radio, Officer Wayne Thompson, who was also driving north on Texas Avenue, made a "U" turn, proceeded to turn left across the intersection and partially blocked the outside and middle lanes of northbound traffic on Texas Avenue in an attempt to slow traffic. His vehicle then came to a complete stop. A collision ensued between the squad car operated by Officer Thompson and the motorcycle driven by Flowers. Petitioner sustained injuries to his leg.

Each officer present prepared a report about the incident. On February 10, 1987, a police department accident review board meeting was held concerning the actions of Officer Thompson during the incident in question. As a result of the board's recommendation, Officer Thompson was

suspended from the police force without pay for two days. The basis for the suspension was Officer Thompson's violation of several sections of the College Station Police Department policy manual regarding establishment of a roadblock. App. p. 1A. Officer Thompson had read and understood the policy manual and knew that it was his responsibility to ask a supervisor if any part of the policy was unclear.

In every instance where an officer of the College Station Police Department is found to have used an inappropriate amount of force, disciplinary action is taken. This is the only incident concerning use of a roadblock known to the College Station officials.

II. Proceedings Below

On May 27, 1987, plaintiff filed his original complaint which was superseded by his second amended complaint filed on March 14, 1988. Plaintiff sued both the City of College

Station, Texas, and Officer Wayne Thompson alleging civil rights violations and state tort claims.

Specifically as to respondent herein, defendant alleged as follows:

> "Defendant Thompson acted pursuant to the procedures, practices, policies and/or customs of the College Station Police Department including but not limited to those relating to roadblocks and/or the apprehension and pursuit of suspects and/or the use of force, or his reasonable understanding thereof. Such procedures, practices, policies and/or customs were approved, adopted and/or ratified by Defendant City of College Station.
>
> "As a direct and proximate result of defendant's actions, the plaintiff was the victim of the conduct alleged herein, suffered the injuries alleged herein, and thereby was deprived the certain rights and privileges secured by the Constitution and laws of the United States of America. These rights and privileges include, but are not limited to, the right to be free from the use of excessive physical police force." App. p. 4A.

Discovery in the case was completed by May 1, 1988. Subsequently, respondent filed its motion for summary

judgment on the basis that Officer Thompson's acts or omissions were not done pursuant to official policy, but rather were done in violation of official written policy for which he was disciplined. The policy, therefore, did not cause Flowers to be subjected to a deprivation of his constitutional rights. Additionally, College Station contended that even assuming Thompson's acts violated petitioner's constitutional rights, proof of a single unconstitutional incident is not sufficient to impose liability on a municipality unless proof of the incident includes proof that it was caused by an existing unconstitutional policy.

The district court held a hearing on College Station's motion for summary judgment and on Flowers' "motion for partial default or summary judgment against the City of College Station, or alternatively for other sanctions or relief."[1/]

[1/] Petitioner's motion was based on College Station's (continued...)

The district court dismissed Flowers' case against the City of College Station and *sua sponte* dismissed Flowers' case against Officer Thompson. Additionally, the court sanctioned College Station three thousand dollars ($3,000) for "destruction of evidence". Pet. App. p. 9A. Flowers appealed the dismissal of both College Station and Officer Thompson to the Fifth Circuit Court of Appeals. Specifically, petitioner claimed that:

> "College Station was not entitled to summary judgment because fact issues existed as to whether Thompson had acted in accordance with the procedures and the policies of the College Station Police Department." App. p. 17A.

Additionally, Flowers argued that:

> "The deprivation...was not brought about by the alleged policy violation...[but] by Thompson placing his police vehicle in the path of Flowers' motorcycle which Thompson testified he had authority to do because he was a supervisor in

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[1/](...continued)
reutilization of the dispatch tape made at the time of the incident in question.

> which the policy itself permits a supervisor to authorize." App. p. 17A-18A.

On April 25, 1989, the Fifth Circuit Court of Appeals issued its opinion affirming the district court's dismissal of Flowers' § 1983 claim against the City of College Station.

In an unpublished opinion, the Fifth Circuit found that because Flowers failed to allege that the City's policy was not itself unconstitutional, proof of more than a single incident was necessary. The court further stated that "[b]y simply noting that the City of College Station has a policy governing roadblocks, Flowers has not alleged that the City has a policy of using those roadblocks in a manner inconsistent with the fourth amendment's proscriptions against unreasonable seizures. Nor has Flowers alleged that his collision was a proximate result of the City of College Station's failure to train its police officers which failure 'amounts to deliberate indifference to the rights of persons with whom the police can

come into contact.'" (citation omitted) *Flowers v. City of College Station, Texas,* No. 88-6004, (5th Cir. Apr. 25, 1989) (per curiam). Pet. App. p. 7A. The court concluded that because Flowers did not allege that a city policy was the "moving force" behind the deprivation and did not meet his burden of proof in that regard, dismissal was proper.

SUMMARY OF THE ARGUMENT

The Fifth Circuit Court of Appeals correctly analyzed the case and concluded that petitioner neither pled nor offered by way of rebuttal summary judgment evidence, those elements which must exist to sustain municipal liability.

The summary judgment evidence clearly establishes that the written policy of the City of College Station was not the moving force behind the actions taken by the police officer in question. Alternatively, even if the officer was motivated by written policy, the respondent nevertheless prevails on the summary judgment motion because petitioner has failed to

plead or prove the existence of similar incidents occurring in the City of College Station.

To a large extent, petitioner is relying on a "failure to train" argument to establish municipal liability and defeat the summary judgment. However, this argument has never been pleaded or raised in any court below and should not be considered by this Honorable Court.

REASONS FOR DENYING THE WRIT

I. Petitioner never raised the purported "failure to train" argument in any court below.

Respondent objects, and urges the Court not to consider any argument of petitioner regarding or supported by his newly asserted "failure to train" claim. This allegation has never been raised prior to its appearance in his petition for a writ of certiorari filed in this Court. This theory was not raised in plaintiff's second amended original petition, his response to College Station's motion for summary judgment,

or in his brief to the Fifth Circuit Court of Appeals. Although the Fifth Circuit mentioned this argument in its opinion, the court simply noted that Flowers failed to allege that his collision was a proximate result of the City's failure to train its officers. Pet. App. p. 7A.

In his petition pending before this Court, Flowers presents three questions for review. Basically, his argument under the first question is that College Station's written policy pertaining to roadblocks "in light of the lack of training provided officers", an unwritten "policy", caused the deprivation of Flowers' constitutional rights. References to this "unwritten policy of inadequate training" appear repeatedly under the first question for review and are additionally mentioned in support of his argument regarding the second question presented.

This Court has previously declined to hear this question when it was "not raised or litigated in the lower courts". *City*

of Springfield v. Kibbe, 480 U.S. 257, 259 (1987) *citing California v. Taylor*, 353 U.S. 553, 556, n.2, (1957). Although a plaintiff need not plead all facts with specificity, a claim under § 1983 must allege a particular policy or practice which violates the constitution and was the proximate cause of the resultant injury.

Because petitioner wholly failed to plead or otherwise raise the issue of an unwritten policy of inadequate training in any court below, respondent urges this Court not to consider any argument of petitioner based on or made in reference to that allegation.[2/]

[2/] Respondent notes that petitioner also raises claims of an unreasonable seizure in violation of the Fourth Amendment to the U.S. Constitution for the first time before this Court. Respondent additionally objects to any argument based on this newly raised claim.

II. The Court of Appeals' legal analysis was correct and judgment was proper.

Petitioner continually asserts that although College Station's written policy pertaining to roadblocks is not itself unconstitutional, Officer Thompson's "reasonable understanding" thereof motivated him to place the roadblock as he did, thereby depriving petitioner of his civil rights. What petitioner fails to recognize or address is the proper legal analysis in this type of case. The officer's "reasonable understanding" or "belief" is irrelevant.

In *Monell v. Dep't of Social Services of the City of New York*, 436 U.S. 658 (1978), this Court held that municipalities are not vicariously liable for their employees' torts. 436 U.S. at 691. For municipal liability to be imposed, official policy must have caused an employee to violate another's constitutional rights. 436 U.S. at 692. In *Monell*, the policy itself was clearly the moving force behind the unconstitutional

action, since the written policy expressly required pregnant employees to take unpaid leaves of absence, in violation of a constitutional right. 436 U.S. at 694. A single implementation of the policy would necessarily result in the deprivation of a constitutional right. This deprivation is attributable to the policymaker, the municipality.

In *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), this Court addressed municipal liability where the city's policy itself was not unconstitutional but an act by a city employee violated a plaintiff's constitutional right. This Court held that at a minimum, there must exist an "affirmative link" between the policy and the specific violation claimed. This Court went on to state that:

> Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policy maker. ...

471 U.S. at 823, 824.

as was the case of *Monell*, itself.

> But where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault and the municipality, and the causal connection between the policy and the constitutional deprivation.

Id.

The relevance of these holdings was recognized in the Court of Appeals' opinion.

Petitioner's amended complaint alleged excessive use of force, done pursuant to the policy of College Station. Petitioner does not allege that the policy is unconstitutional. Petitioner neither alleged nor offered any proof that there was an unwritten policy or custom condoning excessive use of force or unauthorized roadblocks. Petitioner neither alleged nor offered any proof that there was ever more than a single

incident of alleged excessive use of force or an incident involving a roadblock. Clearly, *Tuttle* requires more.

III. The conclusion of the Court of Appeals was supported by summary judgment evidence.

As previously stated, College Station argued that Officer Thompson did not act pursuant to written policy; that is, the policy was not the moving force behind his actions. However, even if the Court found that the policy, which petitioner has not alleged is unconstitutional, was the moving force behind Officer Thompson's actions, College Station nevertheless prevails because petitioner did not plead or prove that any other similar incident has occurred.

As to the first basis for summary judgment, the evidence clearly supports the conclusion that Officer Thompson acted in violation of city policy with regard to placing his police car across the lanes of oncoming traffic. As

previously described, the City of College Station policy provides:

> Prior to setting up roadblocks, involved officers will be required to notify the dispatcher and obtain permission from the shift commander or supervisor on duty to erect or to establish a roadblock. The exact location of where the roadblock will be set up will be given to the dispatcher after officers have received authorization to erect one. Supervisory officers will have the authority to deny any authorization for setting up or establishing a roadblock or to change the location of the roadblock.

Although petitioner refers to Thompson's violation of policy as a technical one, in that Thompson "failed to notify the dispatcher", Thompson was actually disciplined for violating several policy sections specifically delineated in a letter to Thompson from the police department. App. p. 1A. Of utmost importance is Thompson's failure to notify the dispatcher and obtain permission from his supervisor. Clearly, his action was not done in conformance with written policy.

The full text of other sections noted in the letter are included in the "statutes and regulations involved" section of this brief.

It is undisputed that Officer Thompson did not at any time notify anyone of his intention or subsequent action. Officer Thompson simply pulled his vehicle into the lane of oncoming traffic. Petitioner argues that Officer Thompson "reasonably believed" that he was a supervisory officer and therefore acted in accordance with the policy. This repeated argument is without legal precedent or foundation in logic. Thompson's belief, whether reasonable or not, does not establish city policy so as to "bootstrap" the city into municipal liability. A counter-result would be tantamount to municipal liability based on *respondeat superior* which forbidden by this court in *Monell v. Dep't of Social Services of the City of New York*, 436 U.S. 658 (1978) and its progeny. Under petitioner's reasoning, the actions or beliefs of an officer in and of

themselves would establish city policy. That result is contrary to the mandates of this Court.

In *St. Louis v. Praprotnik*, 485 U.S. 112 (1988), this court held that the decision as to whether a particular official is a policy maker is a question of state law, a legal question to be resolved by the judge. Petitioner has neither alleged nor contended that Thompson was in a position to dictate or promulgate official policy of the City of College Station. In response to petitioner's "reasonable belief" argument, the Fifth Circuit stated that "the district court in the instant case never reached the issue of whether a constitutional violation had occurred since it found that because Officer Thompson did not obtain permission for the roadblock, he did not act pursuant to official policy or custom." Pet. App. p. 6A.

As to College Station's alternative basis for summary judgment, the evidence conclusively establishes that this is the only incident concerning a roadblock known to College Station

officials. The City of College Station does not have an unwritten policy, custom or practice condoning officers' use of excessive force.[3/] Summary judgment evidence establishes that in each and every occasion where an officer has been found to use excessive force, that officer is disciplined.

IV. Reply to petitioner's reasons for granting the writ.

A. Petitioner has presented three questions for review, all of which appear to be interrelated. Initially petitioner claims that the Court of Appeals affirmance of the dismissal is "repugnant to this Court's opinions in *Brower, et al v. County of Inyo, et al.*, 489 U.S. _____, 109 S. Ct. 1378 (1989) and *City of Canton, Ohio v. Harris, et al.*, 489 U.S. _____, 109 S.Ct. 1197 (1989), and "established principals regarding summary judgment".

[3/] Excessive use of force was the particular violation alleged in Flowers' second amended complaint.

The thrust of plaintiff's argument in this regard seems to be that the "vague" written policy coupled with the department's failure to train Officer Thompson resulted in a deprivation of petitioner's constitutional rights. There are several reasons why this argument is flawed. First, as previously discussed, petitioner has never pled or otherwise raised an argument regarding failure to train in any court below. As such, respondent urges the Court not to consider this argument following the reasoning in *Springfield v. Kibbe*, 480 U.S. 257 (1987). Accordingly, the case of *Canton v. Harris*, 489 U.S. _____, 109 S.Ct. 1197 (1989) is unavailing and irrelevant to the issues properly before this court. Thus, under petitioner's first question for review, there remains under consideration the official written policy of College Station concerning roadblocks and use of force, and actions taken by Officer Thompson. Petitioner neither claimed that the written policy of the City of College Station was facially

unconstitutional, nor that Officer Thompson was in a position to dictate official policy of the City.

Petitioner states that the Court of Appeals appears to have found that there was no "policy or that there was no causation of the injury by the policy" and curiously contends that neither ground mentioned would suffice for summary judgment purposes. Pet. pp. 9, 10. Under this Court's holding in *Monell* and its progeny, either finding would support the Court of Appeals' conclusion. The Fifth Circuit, however, did not have to reach that question. Petitioner never alleged that College Station has a policy of using roadblocks in a manner inconsistent with the Fourth Amendment, or that the collision was a proximate result of the City's failure to train its officers. Therefore, he did not allege and did not bear his burden of proving the existence of a policy which was the causal connection between an action taken by Thompson and a constitutional deprivation.

Further, petitioner seems to argue that this court's holding in *Brower, et al. v. County of Inyo*, 489 U.S. _____, 109 S.Ct. 1378 (1989), that a roadblock may be a seizure under the Fourth Amendment's proscription against unreasonable seizures precludes the entry of summary judgment in this case. Petitioner again fails to address the requirement of a nexus between an employee's act and official city policy. As this Court has repeatedly held, municipal liability may not be based on *respondeat superior*. *Monell v. Dep't of Social Services of the City of New York*, 436 U.S. 658 (1978), *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985). A city is not automatically liable under § 1983 if one of its employees "happens to apply the policy in an unconstitutional manner, for liability within *respondeat superior*". *Canton v. Harris*, 489 U.S. _____, 109 S.Ct. 1197, 1203 (1989). College Station offered proof that the policy was not followed. Unquestionably, the policy does not authorize excessive use of

force or unreasonable seizures. Petitioner has never made these allegations. The policy does not authorize establishment of a roadblock without first notifying the dispatcher and obtaining permission. Even if the policy, which is admittedly constitutional, somehow motivated Officer Thompson to take actions contrary to specific instructions of written policy, proof of a single incident is not enough to impose municipal liability in this case. *Tuttle*, Id. Petitioner confuses his complaint against Officer Thompson with municipal liability.

Petitioner additionally attempts to relate the reuse of the dispatch tape with liability in this case. The district court denied his motion for summary judgment which was based on the reused tape issue. That denial was not appealed and the issue, therefore, is not before this Court. In any event, the dispatch tape, which was a 24-hour continuous tape recording conversations between the dispatcher and police officers via radio was only relevant as to the issue of whether Officer

Thompson complied with policy and notified the dispatcher of his intent to use his police vehicle as a roadblock. Officer Thompson has always admitted that he failed to notify the dispatcher to obtain permission to set up his roadblock.

In conclusion of his first question for review, petitioner states that under "general summary judgment principles" this Court should grant certiorari and the Court of Appeals' decision should be reversed. On the contrary, the purpose of summary judgment is to expedite the disposition of cases where material facts are not in dispute, as in this case. Petitioner's arguments that fact issues exist regarding Officer Thompson's "reasonable beliefs" or whether the "seizure" was unreasonable need not be considered in resolving the summary judgment issue. Petitioner cites no authority which supports the transformation of an officer's beliefs, whether reasonable or not, into official city policy. Whether the roadblock was an unreasonable seizure is also irrelevant because it was not

authorized by city policy. Notwithstanding petitioner's arguments to the contrary, College Station has presented ample evidence of Officer Thompson's failure to conform with policy and has discharged its burden under *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). There is no evidence in the record to show that there was more than this single incident of the use of a roadblock. Petitioner has not met his burden of proof required for responding to a motion for summary judgment. Petitioner's argument of the missing tape fails to create even "mere doubt". *Matsushita Electric Industrial v. Zenith Radio Corporation*, 475 U.S. 574 (1986). The petitioner, as a nonmovant plaintiff, has not come forward with sufficient evidence of his claim. *See*, *Celotex Corp. v. Catrett*, 477 U.S. 317.

B. Secondly, petitioner argues in his second question presented that College Station should not avoid municipal liability by the "mere technical" violation of roadblock policy

when the officer reasonably believed he acted in accordance with department policy and that he "substantially complied" with the policy in all material aspects.

Petitioner insists that the single violation of policy for which Thompson was disciplined was his failure to notify the dispatcher. To the contrary, the summary judgment evidence includes the letter from the City of College Station to Officer Thompson noting several different sections with which Officer Thompson did not comply. App. pp. 1A-2A. Indisputably, Officer Thompson failed to notify the dispatcher and obtain permission from the shift commander or supervisor on duty to erect or establish the roadblock. Obviously, one notifies the dispatcher to obtain permission and to notify other officers that a roadblock is being erected. Plaintiff's failure to obtain permission from the shift commander or supervisor on duty is clearly not a technical violation. Thompson's mistaken belief that he was a supervisor is not supported by evidence in the

record. Even if Thompson were considered to be a supervisor, the requirements of *Tuttle* are still lacking in that petitioner has only offered proof of a single incident of alleged unconstitutional activity on the part of an officer.

C. Finally, petitioner claims in his third question for review, that municipal liability should not be avoided when the police officer "believed he did act and could have acted as he did" pursuant to policies other than those specifically directed toward roadblocks. Petitioner here appears to argue that if Officer Thompson complied with some but not all of the provisions of city policy, then policy was followed.

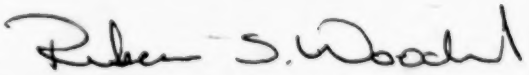
Either policy was followed, or policy was violated. The summary judgment evidence in this case clearly establishes the latter. Petitioner's argument, made without any supporting authority, is spurious at best.

CONCLUSION

The conclusion of the Fifth Circuit Court of Appeals is unquestionably supported by the pleadings, evidence, and relevant law. Applicable legal principles of summary judgment and municipal civil rights liability were followed and applied.

For these reasons and those specifically discussed above, respondent respectfully requests that this Court deny Flowers' petition for certiorari.

Respectfully submitted,



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ATTORNEYS FOR
RESPONDENT

CERTIFICATE OF SERVICE

I, Rebecca S. Woodward, a member of the Bar of this Court*, hereby certify that on the 25th day of August, 1989, three true and correct copies of the above and foregoing brief in opposition were mailed by certified mail, return receipt requested, postage pre-paid to the persons listed below. I further certify that all parties required to be served have been served.

Mr. Brian S. Riepen
Riepen & O'Connor
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Dallas, Texas 75201

Mr. James H. Limmer
Tekell, Book, Matthews & Limmer
3600 Two Houston Center
Houston, Texas 77010

Rebecca S. Woodward

* I have been informed that my admission to the Bar of the Supreme Court will become effective on August 25, 1989.

APPENDIX

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CITY OF COLLEGE STATION
Police Department
P. O. Box 9960 2611 Texas Avenue
College Station, Texas 77840
Phone 1-409-764-3600

Officer Wayne Thompson,

This letter is to address the roadblock you constructed on the night of February 5, 1987 at approximately 7:27 p.m. using your assigned patrol unit.

Upon reviewing the policy manual it has been determined that such a roadblock was not within policy guidelines.

On OPERATIONS - 3, V PARAGRAPH G, it so states:

> "NO OFFICER OF THIS DEPARTMENT, UPON BEING NOTIFIED OF A PURSUIT IN PROGRESS, WILL KNOWINGLY ASSUME A COURSE OF TRAVEL OR A LOCATION THAT WOULD PUT THEIR POLICE UNIT INTO THE PATH OF ONCOMING PURSUED OR PURSUIT VEHICLES UNLESS OTHERWISE OUTLINED WITHIN THIS POLICY."

There is no situation outlined in this policy which would allow for such action accept for authorization from your shift

commander or supervisor, which was not obtained.

In OPERATIONS - 3, VI PARAGRAPH A, it states:

> "A ROADBLOCK MAY BE CONSTRUCTED TO STOP A FLEEING VEHICLE AS LONG AS A REASONABLE EFFECTIVE ADVANCE WARNING IS GIVEN."

PARAGRAPH C, allows for a roadblock if:

> "PROBABLE CAUSE EXISTS FOR OFFICERS TO BELIEVE THAT THE OPERATOR OF A FLEEING VEHICLE IS RESPONSIBLE FOR THE COMMISSION OF A FELONY FOR WHICH THE USE OF DEADLY FORCE IS JUSTIFIED."

PARAGRAPH D, however, states that:

> "PRIOR TO SETTING UP ROADBLOCKS, INVOLVED OFFICERS <u>WILL BE REQUIRED TO NOTIFY THE DISPATCHER AND OBTAIN PERMISSION</u> FROM THE SHIFT COMMANDER OR SUPERVISOR ON DUTY TO ERECT OR ESTABLISH THE ROADBLOCK."

It is for the lack of the above stated policy that the construction of the roadblock by you on 02-05-87 is deemed outside policy guidelines.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

WALLACE FLOWERS,	§	
	§	
Plaintiff,	§	
	§	
V.	§	CIVIL ACTION NO.
	§	H-87-1694
CITY OF COLLEGE	§	
STATION, TEXAS; AND	§	
WAYNE THOMPSON	§	
	§	
Defendants.	§	

SECOND AMENDED COMPLAINT

COMES NOW Plaintiff WALLACE FLOWERS ("Plaintiff"), and for his complaint against Defendants CITY OF COLLEGE STATION, TEXAS ("College Station"), and WAYNE THOMPSON ("Thompson") (sometimes hereinafter collectively referred to as "Defendants") does allege and state as follows:

THE PARTIES

1. Plaintiff is a citizen and resident of the State of Texas, County of Brazos.

2. Defendant College Station is a municipal body politic and corporate in perpetuity, pursuant to the laws of the State of Texas. Defendant College Station maintains and is responsible for the actions of the College Station Police Department.

3. Defendant Thompson is a police officer, employed by Defendant College Station, and at all relevant times herein acted within the scope of this[sic] duties as an employee of Defendant College Station.

JURISDICTION AND VENUE

4. This is a civil rights action seeking damages under 42 U.S.C. § 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331 and 1343. This action involves ancillary causes of action under Texas law.

5. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(b), as

the claim arose and all Defendants reside in this district.

BACKGROUND

6. On or about February 5, 1987, Plaintiff was proceeding northbound on a motorcycle in the City of College Station on South Texas Avenue between Holleman and Southwest Parkway when a southbound College Station Police squad car operated by Defendant Thompson pulled directly into the northbound lanes of traffic causing a collision with the Plaintiff's motorcycle and the Plaintiff.

7. As a direct and proximate result of this collision, Plaintiff has suffered severe and debilitation injuries, including but not limited to a multiple fracture of his left leg and ankle. Plaintiff has suffered general damages, has had to incur and will likely continue to incur substantial medical

expenses, has lost wages, and has suffered a diminution of his earning capacity.

COUNT I

8. For his first cause of action against Defendants, Plaintiff realleges and incorporates by reference paragraphs 1-7, supra, and further states as follows:

9. At all relevant times herein, Defendants acted under color of the laws of the State of Texas and the City of College Station. Defendant Thompson acted pursuant to the procedures, practices, policies and/or customs of the College Station Police Department including but not limited to those relating to roadblocks and/or the apprehension and pursuit of suspects and/or the use of force, or his reasonable understanding thereof. Such procedures, practices, policies and/or customs were approved, adopted and/or ratified by Defendant City of College Station.

10. As a direct and proximate result of Defendants' actions the plaintiff was the victim of the conduct alleged herein, suffered the injuries alleged herein, and thereby was, deprived of certain rights and privileges secured by the Constitution and laws of the United States of America. These rights and privileges include but are not limited to the right to be free from the use of excessive physical police force. Plaintiff is entitled to recover compensatory damages from Defendants.

11. The Defendants' actions have made it necessary for Plaintiff to retain the undersigned attorneys. Plaintiff is entitled to recover from the Defendants compensation for reasonable fees for said attorneys' services in this action, as well as reasonable fees for any and all appeals to other Courts.

WHEREFORE, Plaintiff prays for judgment against all Defendants, and each of them, as set forth hereinafter.

COUNT II

12. For his second cause of action against Defendants, Plaintiff realleges and incorporates by reference paragraphs 1-7 and 9-11, supra, and further states as follows:

13. Defendant Thompson operated his squad car in a careless, reckless, and negligent manner.

14. As a direct and proximate result of the Defendants' negligence, Plaintiff has suffered damages as herein alleged.

15. The Defendant College Station has received notice of the subject collision pursuant to the terms of its City Charter and the Texas Tort Claims Act.

WHEREFORE, Plaintiff prays for judgment against all Defendants, and each of them, as set forther[sic] hereinafter.

COUNT III

16. For his third cause of action against all Defendants, Plaintiff realleges and incorporates by reference paragraphs 1-7, 9-11, and 13-15, supra, and further states as follows:

17. The actions of Defendants constitute gross negligence and indifference with respect to the rights of Plaintiff so as to justify an award of punitive damages against the Defendants in such an amount as to punish and make an example of Defendants and to deter others from similar conduct.

18. As a direct and proximate result of Defendants' actions, Plaintiff has suffered damages as herein alleged.

WHEREFORE, Plaintiff prays for judgment against all Defendants, and each of them, as set forth hereinafter.

COUNT IV

19. For this fourth cause of action against all Defendants, Plaintiff realleges and incorporates by reference paragraphs 1-7 and 9-11, supra, and further states as follows:

20. The actions of Defendants were willful and malicious, and without justification, and constitute as assault against the Plaintiff.

21. The Defendants' actions were performed in such a manner as to entitle Plaintiff to punitive damages, which damages should be awarded in such an amount as to punish and make an example of Defendants and to deter others from similar conduct.

22. As a direct and proximate result of Defendants' actions, Plaintiff has suffered damages as herein alleged.

WHEREFORE, Plaintiff prays for judgment against all Defendants, and each of them, as set forth hereinafter.

COUNT V

23. For his fifth cause of action against all Defendants, Plaintiff realleges and incorporates by reference paragraphs 1-7, 9-11, 17-18 and 20-22, supra, and further states as follows:

24. The foregoing willful, malicious and/or grossly negligent or indifferent actions of Defendants have been so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community.

WHEREFORE, Plaintiff prays for judgment against all Defendants, and each of them, as follows:

1. For general damages in an amount in excess of $500,000 and/or according to proof;

2. For medical and related expenses in an amount in excess of $500,000 and/or according to proof;

3. For loss of income and wages and other special damages in an amount in excess of $500,000 and/or according to proof;

4. For punitive damages in the amount of 2,000,000;

5. For reasonable attorneys' fees;

6. For costs and expenses of this suit; and

7. For such other and further relief at law and/or in equity to which Plaintiff may be justly entitled.

DATED: January 15, 1988.

Respectfully submitted,

RIEPEN & O'CONNOR

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By: _____
Michael F. O'Connor
102 E. 26th Street
Bryan, Texas 77803
409/775-0471

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been sent by certified mail, return receipt requested, to all counsel of record, on this the 15th day of January, 1988.

_____
Cheryl D. Nabors

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 88-6004

WALLACE FLOWERS

Plaintiff/Appellant

VERSUS

CITY OF COLLEGE STATION,
TEXAS; AND WAYNE THOMPSON

Defendants/Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION
JUDGE LYNN N. HUGHES

BRIEF FOR APPELLANT WALLACE FLOWERS

OF COUNSEL:

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SUMMARY OF THE ARGUMENT

The district court committed reversible error by sua sponte granting summary judgment on behalf of Defendant Wayne Thompson who had not moved for summary judgment. Case authority from this Circuit directly on point holds that this was error.

College Station was not entitled to summary judgment because fact issues existed as to whether thompson had acted in accordance with the procedures and the policies of the College Station Police Department. Whereas one statement in the policy required Thompson to "notify the dispatcher" prior to setting up a road block, other statements in the policy would have permitted Thompson to take the action he did without notifying the dispatcher.

Moreover, the deprivation of Flowers' civil rights was not brought about by the

alleged policy violation, that is, the failure to notify the dispatcher. Rather, the deprivation of Flowers' civil rights was brought about by Thompson's placing his police vehicle in the path of Flowers' motorcycle which Thompson testified he had authority to do because he was a supervisor and which the policy itself permits a supervisor to authorize.

ARGUMENT

I. WHETHER THE DISTRICT COURT ERRED IN SUA SPONTE GRANTING SUMMARY JUDGMENT FOR DEFENDANT WAYNE THOMPSON WHO HAD NOT MOVED FOR SUMMARY JUDGMENT.

This Court has already addressed this issue, and squarely held that it was error for a district court sua sponte to enter summary judgment for a nonmovant who did not join in another party's motion for summary judgment. Matter of Hailey, 621 F.2d 169, 171 (5th Cir. 1980); Hanson v. Polk County Land, Inc., 608

F.2d 129, 131 (5th Cir. 1979). The holding in the leading decision, Hailey, was recently reaffirmed. Clark v. Tarrant County, Texas, 798 F.2d 736, 741 (5th Cir. 1986), reh'g denied, 802 F.2d 455.

The notice and hearing requirements of Rule 56(c), Fed.R.Civ.P., are not "unimportant technicalities" and must be "strictly adhered to." Hailey, supra, 621 F.2d at 171; Hanson, supra, 608 F.2d at 131. With respect to his civil rights claim against Thompson, Flowers was denied these protections provided by Rule 56(c) and the summary judgment entered by the district court must be reversed.

Moreover, under the allegations of the Second Amended Complaint, it could have been shown that Thompson recklessly used deadly force in bringing about the collision between his squad car and Flowers' motorcycle. This stated a civil rights cause of action against

Thompson. See Grandstaff v. City of Borger, Texas, 767 F.2d 161, 168 (5th Cir. 1985). Had Flowers known that the district court contemplated summary judgment in favor of the nonmovant Thompson, Flowers could have presented additional evidence in support of his claim. Even on the record before the district court, however, summary judgment in favor of Thompson would have been inappropriate.

II. WHETHER THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR THE DEFENDANT CITY OF COLLEGE STATION, TEXAS, WHEN (1) GENUINE ISSUES OF MATERIAL FACT EXISTED AS TO WHETHER THOMPSON HAD ACTED IN ACCORDANCE WITH THE PROCEDURES AND POLICIES OF THE COLLEGE STATION POLICE DEPARTMENT AND (2) FLOWERS' DEPRIVATION OF CIVIL RIGHTS WAS BROUGHT ABOUT NOT BY THE ALLEGED POLICY VIOLATION, BUT RATHER BY ACTIONS IN ACCORDANCE WITH POLICY.

In order to hold a municipality liable under 42 U.S.C. § 1983, "[t]here must be (1) a policy (2) of the city's policymaker (3)

that caused (4) the plaintiff to be subject to a deprivation of constitutional right." Grandstaff, supra, 767 F.2d at 169.

The thrust of College Station's argument in its Motion for Summary Judgment is that there could not have been a policy that caused the deprivation of rights because "Officer Thompson's acts or omissions were not done pursuant to official policy or custom, but were done in violation of the official written policy of College Station." Rec 214.

In support of its position that Officer Thompson's actions were not taken pursuant to Police Department policy, College Station offered the Affidavit of Edgar Feldman. This Affidavit shows that Thompson was disciplined following the subject collision for violating city policy by failing "to notify the dispatcher before he set up his vehicle." Rec 246-51.

Specific policy provisions and testimony of Thompson justifying his action in placing his squad car in front of Flowers' motorcycle, without notification of the dispatcher, are detailed in the Statement of facts, supra at 3-4. Plaintiff thus came forward with evidence that Officer Thompson did in fact act in accordance with the procedures, policies, and/or customs of the College Station Police Department through the deposition testimony of Wayne Thompson and following deposition exhibits, which included a copy of police policy on "Fresh Pursuits." Rec 13, 19-48, 229. Moreover, Officer Thompson believed that he himself was a supervisor with authority to set up a road block on his own. Rec 29-30.

Whether Thompson actually violated policy of the College Station Police Department, or whether he complied with the policy of the College Station Police Department is therefore

a fact question. Any finding by the City of College Station that he violated official police policy is not conclusive or binding on the court and jury. Indeed, if it were, any municipality could avoid liability for its tortious conduct by disciplining the individual involved who may have reasonably believed he was acting in accordance with policy or may in fact have been acting in accordance with policy.

Whether Thompson reasonably believed that he was acting in accordance with the policy of the College Station Police Department when he took the actions giving rise to the basis for this lawsuit is a fact question.

Whether the policy of the College Station Police Department pursuant to which Officer Thompson believed he was acting was so contradictory, or so vaguely or incompletely written, that a reasonable police officer

could reasonably believe he was acting according to the policy is a fact question.

The different shades of fact issues created by the conflicting evidence presented by both College Station and Flowers render summary judgment inappropriate. It cannot be said, as a matter of law, that the policy pursuant to which Thompson believed he was acting did not cause Flowers' deprivation of civil rights.

This Court has held that a district court may grant summary judgment "only when the moving party has established his right to judgment with such clarity that the nonmoving party cannot recover . . . under any discernible circumstances." Jones v. Western Geophysical Company of America, 669 F.2d 280, 283 (5th Cir. 1982). The party seeking summary judgment must dispel "all reasonable

doubts as to the existence of the genuine issue of material fact." Id.

It cannot be said, simply because College Station disciplined Thompson for violation of a policy, that as a matter of law Thompson was not acting in accordance with that specific College Station policy, or other applicable policies, or the body of College Station policies governing this type of circumstance. Thompson himself reasonably believed that he was acting in accordance with College Station policy, and for purposes of summary judgment, the evidence must be viewed in the light most favorable to the nonmovant, Flowers.

For Judge Hughes to hold as a matter of law that Thompson did not act in accordance with College Station policy required that he resolve that factual issue, contrary to the instruction of this Court that the district court's function in deciding a summary

judgment motion is to determine "only whether there is an issue of fact to be tried." Id. Indeed, the "fact that it appears that the nonmover is unlikely to prevail at trial or that the mover's facts appear more plausible are not reasons to grant summary judgment." Id.

Indeed, close inspection of the specific, alleged policy violation shows that the "violation" was not casually related to the collision and that insofar as causation of the collision was concerned, city policy was followed in all relevant and material aspects. The violation was that Thompson did not notify the dispatcher. Rec 248. The apparent purpose of notifying the dispatcher, however, had nothing to do with Thompson's obtaining permission to set up a roadblock or otherwise engage in the subject course of conduct. See Rec 46.

The deprivation of Flowers' civil rights was not brought about by the alleged policy violation, that is, the failure to notify the dispatcher. Rather, the deprivation of Flowers' civil rights was brought about by Thompson's placing his policy vehicle in the path of Flowers' motorcycle which Thompson testified he had authority to do because he was a supervisor and which the policy itself permits a supervisor to authorize. College Station failed to adduce evidence that Thompson could not be considered a "supervisor." Flowers showed that Thompson thought he was.

The essence of College Station's claim is that because Thompson was disciplined for failing to notify the dispatcher, he violated a city policy and therefore could not have acted in accordance with city policy in bringing about the injuries that Flowers

suffered. Under this perspective, Thompson could have complied with city policy and could have set up his "road block," thereby still seriously injuring Mr. Flowers, so long as he first "notified the dispatcher." Doubtless there would be a civil rights violation in this circumstance: Thompson could have made the decision to set up the road block on his own, but so long as he technically notified the dispatcher, his injury of Mr. Flowers had the blessing of the City of College Station.

Whether there was a technical violation of policy is inconsequential in light of the fact that the actions taken that caused the injuries were in substance in compliance with policy.

To allow the summary judgment to stand would enable College Station to avoid responsibility for its tortious conduct by

ferreting a technical violation of a policy that was in all meaningful ways followed.

CONCLUSION

The district court erred in granting summary judgment to Thompson who had not even moved for summary judgment. The district court further erred in granting summary judgment for College Station because issues of fact existed as to whether Thompson acted in accordance with College Station policy, and also it was not the alleged policy violation, but rather actions in accordance with policy, that brought about the deprivation of Flowers' civil rights.

For all the reasons set out above, the final judgment of the district court dismissing Flowers' civil rights claims against the City of College Station and Wayne Thompson should be reversed and this case should be remanded to the district court for

a new trial and further proceedings consistent with the opinion of this honorable United States Court of Appeals for the 5th Circuit, and for such other and further relief as may be just and appropriate.

Respectfully submitted,

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